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CHARLES ELMORE CROPLEY
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IN THE

SUPREME COURT OF THE UNITED STATES.

LEWIS K. STONER,
Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY,
Respondent.

No. [redacted] '74

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

Page

I. The petition for certiorari should be denied, because petitioner has failed to comply with Rule 38 of this Court in that he has not stated the statutory provision believed to sustain the jurisdiction of the Court 1

II. The Circuit Court of Appeals in deciding this case followed and properly applied the law of Missouri 2

III. There is no ruling by the Supreme Court of Missouri that the policies in question are not plain and unambiguous, and, therefore, subject to judicial construction 7

IV. The opinion below is not in conflict with "the law of Missouri" and is not in conflict with the case of Erie Railroad Co. v. Tompkins 10

V. There is no important question of local law or of the common law involved in the decision of this case 13

VI. The amount involved is more than three thousand dollars ($3,000.00) and the federal courts have jurisdiction 14

Conclusion 15

Cases Cited.

Bellows v. Travelers Ins. Co. (Mo.), 203 S. W. 978.... 7

Erie Railroad Co. v. Hilt, 247 U. S. 97.....11, 12, 13

Heald v. Aetna Life Insurance Company, 340 Mo. 1143, 104 S. W. (2d) 379.....5, 6, 7, 9, 10

Lydon v. New York Life Ins. Co., 89 Fed. (2d) 78.... 14

Massachusetts Protective Ass'n v. Mauber, 110 Fed. (2d) 203 7

Poe v. Illinois Central R. Co., 339 Mo. 1025, 99 S. W. (2d) 82 11
Russell v. Todd, ... U. S. ...., 60 S. Ct. 527, 84 L. ed. 517, l. c. 523 (1940) 12, 13
State ex rel. Duraflor Products Co. v. Pearcy, 325 Mo. 335, 29 S. W. (2d) 83 8
State ex rel. Metropolitan Life Ins. Co. v. Allen, 337 Mo. 525, 85 S. W. (2d) 469 7
State ex rel. Metropolitan Life Ins. Co. v. Hostetter, 338 Mo. 589, 92 S. W. (2d) 122 7
State ex rel. New York Life Ins. Co. v. Shain 7
Stoner v. New York Life Insurance Company, 90 S. W. (2d) 784 ..... 3, 7, 8, 10
Stoner v. New York Life Insurance Company, 114 S. W. (2d) 167 ..... 3, 5, 6, 7
Trapp v. Metropolitan Life Ins. Co. (U. S. C. C. A. Mo.), 70 F. (2d) 976, aff. 72 F. (2d) 374, cert. den. Metropolitan Life Ins. Co. v. Trapp, 293 U. S. 596, 55 S. Ct. 112, 79 L. ed. 690 11

Statutes and Rules Cited.

New Rules of Federal Procedure, Rule 50 7
Missouri Constitution, Art. VI, Sec. 3, Am. 1884, Sec. 6. 11
Revised Statutes of Missouri 1929, Sec. 1907 11
Rules of this Court, Paragraph 1, Rule 12 2
Rules of this Court, Paragraph 2, Rule 38 1

IN THE

SUPREME COURT OF THE UNITED STATES.

LEWIS K. STONER,
Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY,
Respondent.

No. 1,000.

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

The petition for certiorari should be denied, because petitioner has failed to comply with Rule 38 of this Court in that he has not stated the statutory provision believed to sustain the jurisdiction of the Court.

Paragraph 2, Rule 38, of this Court provides as follows:

> "* * * The petition shall contain a summary and short statement of the matter involved; a statement particularly disclosing the basis upon which it is contended that this court has jurisdiction to review the judgment or decree in question. (See Rule 12, par. 1) * * *."

Rule 12, paragraph 1, referred to therein, provides, in part, as follows:

> "• • • The statement shall refer distinctly (a) to the statutory provision believed to sustain the jurisdiction, • • •."

Petitioner's petition and suggestion in support thereof wholly fail to comply with the above rule in that they contain no statement of the jurisdiction of this Court. Under Rule 38 the petition should be denied.

II.

The Circuit Court of Appeals in deciding this case followed and properly applied the law of Missouri.

It is urged by petitioner that the Circuit Court of Appeals refused to follow and apply the law of Missouri to the facts in this case when it held that the evidence was insufficient to sustain a finding of total disability, and directed the District Court to enter judgment for the plaintiff. To determine this question it is necessary to first look to the facts in the record upon which the Circuit Court of Appeals based this finding.

The record discloses that the petitioner, insured, is actively engaged in the business of farming, operating a 200-acre farm and another 105-acre farm from which he has earned a living and a profit in addition (A. 49, 33). The facts with reference to the work he was able to do and did perform, set out in the opinion of the Court (Tr. 113), appear uncontradicted in the record, and the correctness of the statement by the Court is not denied by petitioner. From these facts, appearing in the evidence and from his personal observation of petitioner, the District Judge who heard the case after waiver of a jury expressly found and stated the disability of petitioner to be as follows (Tr. 99-100):

"* * * the defendant * * * was in court, however (he walked in during the progress of the trial), and we observed him carefully. (It is knowledge made famous by the oft-repeated tale that one can obtain a much clearer comprehension of the appearance and nature of an elephant by seeing one than by hearing the learned descriptions of even four eminent men of science.) We observed the defendant carefully. He walked into the court room, using a cane, but with only a slight limp, and with no expressions of pain. He appeared to be a strong, vigorous, healthy man, whose manner, features and appearance suggested intelligence above that of the average farmer. We have considered all of the testimony with the aid of this personal, visual, greatly significant observation.

"The whole truth of the matter is that as a result of his injury the defendant has a permanently stiffened ankle, that any extensive use of that ankle is now painful, so that it cannot be extensively used both because of the pain and because of the stiffness; that medical and surgical treatment possibly would remove entirely the pain element in the defendant's ankle condition. The only business in which the defendant has had training and experience is that of farming. He is not physically able, because of his injury and its consequences, to perform those farmer's tasks which require the more or less continuous and full use of both feet. That is the extent of his handicap."

It is insisted by petitioner that the decision below directing judgment to be entered for the plaintiff, respondent here, is in conflict with the Missouri law and particularly the decisions of *Stoner v. New York Life Insurance Company*, 90 S. W. (2d) 784, and *Stoner v. New York Life Insurance Company*, 114 S. W. (2d) 167; that these two decisions of the Kansas City Court of Appeals, which passed upon the policies here in question, are controlling upon the Court below and forbid the direction of a verdict for plaintiff. It is stated that these decisions are controlling upon

the Court, because "the evidence in those cases and the case at bar is identical" (Petitioner's Brief, p. 14). The record discloses that this statement is erroneous.

In addition to the evidence offered in those cases, which was reoffered in this case, there appears in the case at bar the following:

(1) The deposition of Lewis K. Stoner (Tr. 75), (2) the testimony of the witness Dr. H. J. Ryan (Tr. 85), and (3) the express finding of fact of the extent of the disability of the insured made from his personal observation of petitioner by the District Judge (Tr. 99-100). This record, therefore, is an entirely different record than the one before the Kansas City Court of Appeals in the cases cited. A very different situation is presented because this record contains the specific finding of fact as to the extent of petitioner's handicap made by the trial judge upon consideration of the evidence and his personal observation of the petitioner at the trial. A jury having been waived, this finding by the trial court stands in the same position as an answer to special interrogatories by the jury.

The ruling of the Kansas City Court of Appeals in the cases before it were made without the aid of the additional testimony in this record and without the finding of fact made by the trial judge, and therefore the cases are not controlling upon the court below in passing upon the present record.

In asserting that these decisions in the Kansas City Court of Appeals forbid the entry of a judgment for the plaintiff on this record, petitioner has wandered into error by assuming that the mere fact that he was held to have a submissible case under the state law requires the federal court to find for him. This is not true when the facts are weighed by the District Court sitting without a jury and expressly found in favor of the respondent. The mere

fact that there was a submissible case for a jury will not prevent an entry of judgment against the petitioner.

The Kansas City Court of Appeals, in the last case, 114 S. W. (2d) 173, where a general verdict was returned for petitioner, ruled that a jury might determine the extent of petitioner's disability and return a verdict under proper instructions. That case has never been retried. When the case at bar came on for trial a jury was waived and the case was tried before a court sitting without a jury. The trial court made special findings of fact, and from this evidence and personal observation specifically found and stated the extent of petitioner's disability (Tr. 99-100).

The Kansas City Court of Appeals, in holding that a submissible case was made where the special findings of fact appearing in this record did not appear, does not hold that the insurance company can never be entitled to win the case. The special findings made by the District Court serve the same purpose as answers to special interrogatories by a jury, and the case now stands as though it had been retried and the jury had found the facts, and the only thing that remains is to apply the law and determine whether or not the facts found constitute total disability.

The question then is, does the opinion at bar violate any rule of law announced by the Kansas City Court of Appeals in the *Stoner* case? The answer must be that it does not.

The Circuit Court of Appeals found that the record before it showed that petitioner "not only can, but does, substantially perform all the substantial and material acts necessary to the prosecution of the business in which the insured is engaged, and that such business returns a profit" (Tr. 117). This statement is based upon the facts found by the trial judge, who sat as a jury.

When the law as announced in the *Stoner* case and in *Heald v. Aetna Life Insurance Company*, 340 Mo. 1143, 104 S. W. (2d) 379, and every other case cited by the peti-

tioner, is applied to these facts it must be found that petitioner is not totally disabled.

Petitioner has again erred in assuming that, because the trial court found that he was physically unable to himself perform some farmer's tasks, that he is totally disabled as a matter of law. The Kansas City Court of Appeals ruled this against him in his last appeal, 114 S. W. (2d), l. c. 171, where it said:

> "• • •. We further held, 90 S. W. (2d) 784, loc. cit. 797, that the conceded inability of plaintiff to perform labor, which was part of his substantial duties, would not justify, as a matter of law, a verdict for the plaintiff; that plaintiff would not be entitled to recover, notwithstanding he could not perform farm labor by reason of his injuries, if he nevertheless had the ability to substantially perform his occupation by discharging duties other than farm labor. • • •"

The Court was there speaking of plaintiff's instruction which it there said singled out some duties of the plaintiff as a farmer and directed a verdict for him if the jury found he was unable to perform these duties. In discussing the instruction further the Court said (l. c. 172):

> "• • • The instruction is also clearly erroneous under the holding in the case of Heald v. Aetna Life Ins. Co., Mo. Sup., 104 S. W. (2d) 379. In that case it was held, in effect, that the fact that some substantial duties cannot be performed does not necessarily mean that the insured cannot substantially perform his occupation in its entirety • • •."

The trial court erred in applying the law to the special findings found by him. The Appellate Court accepted the findings of the trial court and correctly applied the Missouri law applicable thereto, as announced in the

Stoner Case, supra, and in the case of *Heald v. Aetna Life Ins. Co.*

We submit there is nothing in any Missouri decision in conflict with the law as applied to these facts. There has been no deprival of right to trial by jury, because a jury was waived, and the Appellate Court has made no assumption contrary to the special findings of fact made by the trial court sitting as a jury. The Circuit Court of Appeals properly found the conclusions of law of the District Court to be erroneous and, applying the Missouri law, reached the conclusion that the petitioner was not entitled to recover.

It is unquestionable that, if a general verdict is contrary to the special findings of fact under the applicable law, the Appellate Court can enter a proper judgment. Rule 50, New Rules of Federal Procedure. *Massachusetts Protective Ass'n v. Mauber,* 110 Fed. (2d) 203.

III.

There is no ruling by the Supreme Court of Missouri that the policies in question are not plain and unambiguous, and, therefore, subject to judicial construction.

Petitioner urges in point (d) of "Reasons Relied Upon for the Allowance of the Writ" that the Supreme Court of Missouri has held that this and like policies are ambiguous and subject to judicial construction, citing the cases of *State ex rel. New York Life Ins. Co. v. Shain; State ex rel. Metropolitan Life Ins. Co. v. Allen,* 337 Mo. 525, 85 S. W. (2d) 469; *State ex rel. Metropolitan Life Ins. Co. v. Hostetter,* 338 Mo. 589, 92 S. W. (2d) 122; *Bellows v. Travelers Ins. Co.* (Mo.), 203 S. W. 978.

It is urged that the Supreme Court of Missouri reviewed the ruling of the Kansas City Court of Appeals in *Stoner v. New York Life Ins. Co.,* 90 S. W. (2d) 784, and affirmed the holding of the Kansas City Court of Appeals

that the policies here in question were ambiguous and subject to construction (Petitioner's Brief, page 29).

The Supreme Court of Missouri did not review the ruling of the Kansas City Court of Appeals in *Stoner v. New York Life Ins. Co.*, 90 S. W. (2d) 784. The respondent in this cause requested the Supreme Court of Missouri to review that decision by filing a petition for writ of certiorari in the Supreme Court of Missouri. The application for the writ was denied without comment, opinion or ruling on any issue involved in the case. There are many reasons why the Supreme Court of Missouri in its discretion might have refused the writ. The application was probably premature, because no final judgment had been rendered, but the cause had simply been remanded by the Court of Appeals. *State ex rel. Duraflor Products Co. v. Pearcy*, 325 Mo. 335, 29 S. W. (2d) 83.

Regardless of the reason prompting the Supreme Court of Missouri to deny the petition for certiorari and thereby to refuse to review the ruling of the Kansas City Court of Appeals, it is well settled that denial by the Supreme Court of Missouri of a petition for a writ of certiorari to review the opinion of an inferior court is not an affirmance of the judgment of the inferior court in any respect. *State ex rel. Duraflor Products Company v. Pearcy*, 325 Mo. 335, 29 S. W. (2d) 83. In that case, supra, the Supreme Court of Missouri said on this subject:

> "But above and beyond the objections just mentioned is the fact that a writ of certiorari is not a writ of right (as regards private suitors), and that the issuance thereof rests in a sound judicial discretion. State ex rel. v. Dobson, 135 Mo. 1, 19, 36 S. W. 238, 243; State ex rel. v. Terte, supra, 320 Mo., loc. cit. 472, 8 S. W. (2d), loc. cit. 19; State ex rel. v. Pfeffle, 220 Mo. App. 676, 682, 293 S. W. 512, 515. A refusal of the writ in the exercise of that discretion cannot be taken as

> an adjudication on the right of the party to have it or on the merits of the controversy, such as makes these questions res judicata. 11 C. J., Sec. 385, p. 213; People ex rel. v. City of Kingston, 101 N. Y. 82, 91, 4 N. E. 348" [29 S. W. (2d), l. c. 87].

Therefore the assertion by petitioner that the Supreme Court of Missouri "ruled that the Kansas City Court of Appeals was right" is erroneous and a misconception of the legal effect of the denial of a petition for writ of certiorari.

The policy involved in this case is different from any of the policies considered by the Supreme Court in the other cited cases. In this policy after the regular form of disability provision, similar to those contained in the policies passed upon by the Supreme Court in other cases, there appears the additional provision:

> "If the insured performs any work or follows any occupation or engages in any business for remuneration or profit, no further income payments shall be made nor premiums waived."

The very purpose of placing this clause in the contract was to remove from this contract any doubt or uncertainty as to what the company undertook to do. The doubtful part of the other contracts ruled subject to judicial construction was whether or not the actual performance of work, although the insured was physically unable to do it, avoided liability under the policy. The part of the policy ruled subject to judicial construction was removed from this policy. The court below clearly distinguishes the policy in this case from the policy construed by the Supreme Court in *Heald v. Aetna Life Ins. Co.*, 430 Mo. 1143, 104 S. W. (2d) 379. In the concurring opinion it is said (Tr. 125):

"* * * This insurance contract states with exceptional clearness what the appellant company undertook to do. With explicit pains it confined its liability to cases where by the injury the insured is not only prevented from performing any work, but also 'from following any occupation or from engaging in any business for remuneration or profit.' The obvious purpose was thus to limit the scope of its responsibility. The majority opinion does not erroneously 'attempt to distinguish between the policies in suit and occupational insurance policies.' The distinction stands out clearly on the face of these policies. The purpose of the insurer to make that distinction is evident. It would be difficult to frame language more descriptive of that purpose. The majority opinion seeks only to give effect to the contract made."

The assignment that the opinion conflicts with the decision of the Supreme Court of Missouri, holding that the contracts in question are not plain and unambiguous and subject to judicial construction, is wholly without merit and affords no reason for the granting of the writ.

IV.

The opinion below is not in conflict with "the law of Missouri" and is not in conflict with the case of Erie Railroad Co. v. Tompkins.

As we have heretofore shown in point III hereof, the opinion sought to be reviewed is not in conflict with any decisions of the Supreme Court of Missouri. Neither is it in conflict with the decision of the Kansas City Court of Appeals in the case of *Stoner v. New York Life Ins. Co.*, 90 S. W. (2d) 784. Therefore, the statement in the decision that the Court is not bound to follow the decisions of the Courts of Appeals of Missouri is immaterial to the decision of the case and should not constitute grounds for the issuance of the discretionary writ of certiorari.

It is insisted by petitioner that under the ruling of this Court in the case of *Erie Railroad Co. v. Hilt*, 247 U. S. 97, the federal courts are controlled by decisions of the Courts of Appeals of Missouri because they declare the law of the state. The petitioner says (Brief page 16):

> "* * * If there be no prior contrary decisions of the Supreme Court, the decisions of any of the three courts of appeals, right or wrong, are conclusive even upon the Supreme Court on certiorari and upon all nisi prius courts. In such circumstances they are the highest courts of the state. * * *"

Petitioner has erred in this statement. The decision of a Court of Appeals of Missouri is not binding upon all nisi prius courts of the state. There are three Courts of Appeals districts in Missouri. A decision of any of the Courts of Appeals is binding only upon the nisi prius courts of the district of the court rendering the decision. The pronouncement of a Court of Appeals is not governing law for the other nisi prius courts of the state, nor for the other Courts of Appeals, and, of course, not for the Supreme Court. Const. of Mo. Am. 1884, Sec. 1907, R. S. Mo. 1929.

The Supreme Court of Missouri is the highest court of the state and it is the only court which can declare the law binding upon all other courts of the state. Mo. Const., Art. VI, Sec. 3, Am. 1884, Sec. 6; *Poe v. Illinois Central R. Co.*, 339 Mo. 1025, 99 S. W. (2d) 82; *Trapp v. Metropolitan Life Ins. Co.* (U. S. C. C. A. Mo.), 70 F. (2d) 976, aff. 72 F. (2d) 374, cert. den. Metropolitan Life Ins. Co. v. Trapp, 293 U. S. 596, 55 S. Ct. 112, 79 L. ed. 690.

In the latter case, in which certiorari was denied by this Court, the Circuit Court of Appeals, in speaking of the Missouri courts, said (70 F. [2d], l. c. 979):

> "The highest court of Missouri is the Supreme

> Court. Its decisions are controlling upon the three Courts of Appeals of that state (Const. Mo., Art. VI [Amendment of 1884], Sec. 6), and decisions of such Courts of Appeals have not the force of stare decisis with the Supreme Court (Sedalia v. Donohue, 190 Mo. 407, 415, 89 S. W. 386, 4 Ann. Cas. 89; Paddock v. Railway, 155 Mo. 524, 534, 56 S. W. 453), nor even as establishing the 'law of the case' (Paddock v. Railway, 155 Mo. 524, 534, 56 S. W. 453; Hennessy v. Brewing Co., 145 Mo. 104, 115, 46 S. W. 966, 41 L. R. A. 385, 68 Am. St. Rep. 554). Hudson v. Maryland Casualty Co. (C. C. A. 8), supra, 22 F. (2d) 791, 792."

As said by the petitioner, it is true that the decisions of the respective Courts of Appeals may be in direct conflict. The decisions of each are binding upon the lower courts of their respective districts. Until the Supreme Court has spoken there is no law of the state.

This Court in the *Erie* case held that federal courts were only bound by the state law "* * * declared by its Legislature in a statute, or by its highest court in a decision * * *."

The Supreme Court of Missouri is the highest court in the state and the only court in this state which can declare the law binding on all the courts of the state. Since a decision of the Court of Appeals is not binding on all of the courts of the state, it cannot be said to declare the law of Missouri absent a ruling by the Supreme Court. A decision of a court of appeals of Missouri, therefore, is not one which *must* be followed by a federal court under the ruling of this Court in the *Erie* case.

This Court in the recent case of *Russell v. Todd*, ... U. S. ...., 60 S. Ct. 527, 84 L. ed. 517, l. c. 523 (1940), ruled that absent a definite ruling by the *highest court* of the state, this Court would accept the decision of an appellate court *as persuasive*. This recent announcement from this Court clearly holds that while decisions of appellate courts

of a state are persuasive upon federal courts, and may be and are often followed, yet it is only the opinions of the *highest court* of the state which the federal court is *compelled* to follow under the ruling in the *Erie* case, supra. The case of *Erie Railroad Company v. Hilt*, 247 U. S. 97, cited and relied upon by petitioner, goes no further than the recent pronouncement in the *Russell* case, supra.

We submit that the ruling of the court below that it was not required to follow the decision of the appellate courts of Missouri is not in conflict with the pronouncement of this Court in the *Erie* case and the *Russell* case, supra.

V.

There is no important question of local law or of the common law involved in the decision of this case.

It is urged by petitioner in point (b) of his reasons relied upon for the allowance of the writ that the court below has erroneously decided an important question of local law contrary to the law of the state. Both the opinion and petitioner's suggestions disclose that no important question of local law or of the common law is involved in this decision. The only question involved is whether or not the facts in this particular record support the conclusions reached by the Court. The court below, in its opinion, has stated and recognized the law of Missouri, and the only controversy is merely a dispute over facts disclosed by the record, all of which have been specially found by the District Court, and no complaint was made thereto. This falls far short of a decision upon an important question of local law. This reason urged by petitioner for the granting of the discretionary writ by this Court is not supported by the record.

VI.

The amount involved is more than three thousand dollars ($3,000.00) and the federal courts have jurisdiction.

It is admitted in petitioner's answer that disability benefits in controversy amounted to two thousand three hundred seventy-five dollars ($2,375.00), and that premiums have been paid on the policies in controversy in the amount of seven hundred ninety dollars and seventy cents ($790.70). The petitioner, however, denied in his answer that he had ever claimed a refund of the premiums; denied that he "is demanding the same *now*," and denied that any controversy exists or has existed in respect to the premiums. However, he does not state that he will not claim the premiums if successful in establishing total disability.

The right to return of the premiums involved in this controversy has been settled by the Circuit Court of Appeals for the Eighth Circuit in the case of *Lydon v. New York Life Ins. Co.*, 89 Fed. (2d) 78. There it is held upon identical policy provisions that premiums must be refunded by the insurer if total disability is established, even though paid without protest by the insured. Consequently, if successful in this declaratory judgment action upon consequential relief, the petitioner will be entitled to the return of these premiums as a matter of right under the *Lydon Case, supra.* Under the rule in the *Lydon Case,* the controversy with reference to the disability benefits, necessarily includes premiums paid upon the policy during the time of alleged disability. That more than three thousand dollars ($3,000.00) is actually in controversy is beyond question, and the opinion of the Circuit Court of Appeals is not subject to question on that account.

CONCLUSION.

In conclusion, it is respectfully submitted that the court below correctly ruled the case upon the record before it; that its decision is in accord with, and follows the law of Missouri, and that it is not in conflict with any decision of the Supreme Court of Missouri. The decision passes upon no important question of local law or of the common law. None of the reasons assigned by petitioner for the issuance of the writ are well founded and no reason can be found in the record which should induce this Court to exercise its discretion and call this case before it for review.

Respectfully submitted,

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